BL-2021-001684

Neutral Citation Number: [2023] EWHC 525 (Ch)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

Royal Courts of Justice, Strand,
London, WC2A 2LL

10 March 2023

Before:

MR JUSTICE LEECH

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B E T W E E N:

SOLICITORS REGULATION AUTHORITY LIMITED	**Claimant**
- and –	
(1) SOOPHIA KHAN **(2) SOPHIE KHAN & CO LIMITED** **(3) JUST FOR PUBLIC LIMITED**	**Defendant**

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MR PHILIP AHLQUIST (instructed by **Capsticks Solicitors LLP**) appeared on behalf of the Claimant
MR JAMES BOGLE (instructed by **Janes Solicitors**) appeared on behalf of the First Defendant.

Hearing date: 8 March 2023

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JUDGMENT (SANCTION)

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

This entire judgment was originally delivered in private. The judge has given leave for the judgment itself but not the Confidential Schedule to be published pursuant to CPR Part 81.8 and the judge then sat in public to hand it down. The confidentiality of the Confidential Schedule must be strictly preserved. All persons, including representatives of the media, must ensure that this condition is strictly complied with. Failure to do so will be a contempt of court.

Mr Justice Leech:

I. Introduction

1. In a reserved judgment dated 14 February 2023 ([2023] EWHC 302 (Ch)) I found the Respondents liable for contempt. I will call that judgment the "**Liability Judgment**" and in this judgment I adopt the same defined terms and abbreviations which I used in the Liability Judgment. I set out my detailed findings at [124] to [127]. For the reasons which I set out below, I adjourned the sanction hearing until 8 March 2023 when Mr Bogle made what I will describe as the "**Status Application**".

2. Before making the substantive application itself Mr Bogle applied for the Court to sit in private under CPR Part 39.2. Mr Ahlquist, who appeared on behalf of the SRA, drew my attention to CPR 81.8:

> "(1) In accordance with rule 39.2, all hearings of contempt proceedings shall, irrespective of the parties' consent, be listed and heard in public unless the court otherwise directs.
>
> (2) Advocates and the judge shall appear robed in all hearings of contempt proceedings, whether or not the court sits in public.
>
> (3) Before deciding to sit in private for all or part of the hearing, the court shall notify the national print and broadcast media, via the Press Association.
>
> (4) The court shall consider any submissions from the parties or media organisations before deciding whether and if so to what extent the hearing should be in private.
>
> (5) If the court decides to sit in private it shall, before doing so, sit in public to give a reasoned public judgment setting out why it is doing so.
>
> (6) At the conclusion of the hearing, whether or not held in private, the court shall sit in public to give a reasoned public judgment stating its findings and any punishment.
>
> (7) The court shall inform the defendant of the right to appeal without permission, the time limit for appealing and the court before which any appeal must be brought.
>
> (8) The court shall be responsible for ensuring that where a sentence of imprisonment (immediate or suspended) is passed in contempt proceedings under this Part, that judgment is transcribed and published on the website of the judiciary of England and Wales."

3. Mr Ahlquist did not oppose the application to sit in private and after hearing argument, I made an order under CPR Part 39.2 and gave my reasons for doing so in a public judgment. In particular, I held that it was necessary to sit in private to secure the proper administration of justice under CPR Part 39.2(3)(g) because Ms Khan might be a protected party and it was necessary to protect her interests pending any determination by the Court that she was such a party.

4. I then adjourned the hearing to notify the national print and broadcast media via the Press Association that I would be sitting in private. There were three journalists present and I explained to them that I would sit in private to hear the Status Application and then sit again in public to hear submissions on sanction (should it arise) and then deliver a reasoned judgment in public stating my findings. The journalists did not object and left the Court. I then heard the Status Application in private.

5. This is the judgment in which I set out my findings and my reasons in public pursuant to CPR Part 81.8(6). Mr Ahlquist submitted (and Mr Bogle accepted) that I should set out my reasons for either acceding to or dismissing the Status Application in a confidential schedule annexed to this judgment and I have taken that course. I direct that the Schedule to this judgment will remain confidential to the parties and shall not be published on the website of the judiciary of England and Wales or on the National Archives.

II. Chronology

6. On 14 February 2023, when I handed down the Liability Judgment, I had intended to hear submissions on sanction immediately after the hand down. However, after hearing Mr Bogle's submissions, I adjourned the hearing for further evidence and submissions and I listed the sanction hearing for 8 March 2023. The Order which I made permitted Ms Khan to serve a further affidavit which she would make herself by 24 February 2023 and expert medical evidence by 3 March 2023. I made it clear in my judgment on the adjournment application that I was prepared to give Ms Khan one final opportunity to purge her contempt and to comply with the Miles Order and that she should have

little doubt that the consequences would be serious if she did not take that opportunity.

7. By Application Notice dated 28 February 2023 Ms Khan applied for an extension of time to serve her evidence and to vacate the sanction hearing. Mr Bogle also filed his Skeleton Argument on sentence ("**Skeleton 1**"). I dealt with Ms Khan's application for an extension of time on paper and by Order dated 2 March 2023 I extended her time to serve further affidavit or witness evidence until 2 pm on 3 March 2023 and to serve expert evidence by 4 pm on 6 March 2023. I refused the application to vacate the sanction hearing. I also made an Order that unless Ms Khan complied with these time limits, she could not rely on any further evidence without the permission of the Court.

8. By Application Notice dated 3 March 2023 Ms Khan applied for a further extension of time. This application was supported by a witness statement made by Ms Khan on 3 March 2023 ("**Khan WS1**") and a witness statement made by her mother, Ms Tilat Khan, also dated 3 March 2023. At that stage, Ms Khan was still stating that she intended to serve affidavit evidence herself dealing with her attempts to purge her contempt.

9. After written submissions from both parties, I accepted Mr Ahlquist's submission that I should list the application for hearing immediately before I dealt with sanction on 8 March 2023. In the event Ms Khan served her expert evidence before 6 March 2023 and indicated that she did not intend to serve any further affidavit evidence herself dealing with mitigation.

10. On 7 March 2023 Mr Ahlquist filed his Skeleton Argument ("**C's Skeleton**"). Mr Bogle filed further written submissions (which I will call "**Skeleton 2**") inviting the Court not to deal with the question of sanction because the medical evidence which Ms Khan had served cast doubt on her "status". In his oral submissions he invited the Court to take one of the following courses:

    (1) To recall and set aside the Liability Judgment and either re-hear or dismiss the Committal Application.

(2) To adjourn the question of sanction pending the appointment of a litigation friend under CPR Part 21 (and any appeal).

(3) To adjourn the question of sanction and to direct the service of expert evidence by the SRA and a hearing at which the Court would hear the expert witnesses cross-examined and determine whether Ms Khan was a protected party.

11. Although no Application Notice was issued by Ms Khan seeking any of this relief, Mr Ahlquist sensibly took no point on this. I will use the term "**Status Application**" as shorthand for the three alternative applications which Mr Bogle made on behalf of Ms Khan. Both Mr Bogle and Mr Ahlquist used the word "status" themselves in relation to the application and I adopt that term myself. Mr Bogle's primary submission was that the Court could not now impose any sanction upon Ms Khan because of her status but that, on the contrary, the Committal Application should be brought to an immediate halt and that I should either review or dismiss it. His alternative submission was that if the Court was now *functus officio* such a review could only be conducted by an appellate Court.

II. Legal Principles

A. The Status Application

(1) CPR Part 21

12. CPR Part 21.1(2) contains the following definitions of the following terms: (a) "the 2005 Act" means the Mental Capacity Act 2005, (c) "lacks capacity" means lacks capacity within the meaning of the 2005 Act; and (d) "protected party" means a party, or an intended party, who lacks capacity to conduct the proceedings. CPR Part 21.3(1) provides that a protected party must have a litigation friend. CPR Part 21.6 provides for the situation where a protected party is a defendant and does not have a litigation friend:

> "(1) The court may make an order appointing a litigation friend. (2) An application for an order appointing a litigation friend may be made by— (a) a person who wishes to be the litigation friend; or (b)

> a party. (3) Where— (a) a person makes a claim against a child or protected party; (b) the child or protected party has no litigation friend; (c) the court has not made an order under rule 21.2(3) (order that a child can conduct proceedings without a litigation friend); and (d) either— (i) someone who is not entitled to be a litigation friend files a defence; or (ii) the claimant wishes to take some step in the proceedings, the claimant must apply to the court for an order appointing a litigation friend for the child or protected party."

13. If Ms Khan is a protected party, therefore, the SRA cannot take a further step in these proceedings until a litigation friend is appointed and the SRA must apply for the appointment of one under CPR Part 21.6(d)(ii). Although Mr Bogle did not submit that the Court could not go on to consider sanction of its own motion having found Ms Khan liable for contempt, CPR Part 21.6 would provide a compelling reason why it should not do so.

(2) The Mental Capacity Act 2005

14. CPR Part 21 defines a protected person by reference to lack of capacity under the Mental Capacity Act 2005 (the "**2005 Act**"). Section 1 sets out a number of principles which apply for the purposes of the Act:

> "(1) The following principles apply for the purposes of this Act.
>
> (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
>
> (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
>
> (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
>
> (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
>
> (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

15. Mr Ahlquist placed particular reliance upon section 1(2) and that Ms Khan must be presumed to have capacity unless it is established that she lacks capacity. He also relied upon section 2 and section 3:

> "2. (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
>
> (2) It does not matter whether the impairment or disturbance is permanent or temporary.
>
> (3) A lack of capacity cannot be established merely by reference to– (a) a person's age or appearance, or (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
>
> (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities….
>
> 3. (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable– (a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision (whether by talking, using sign language or any other means).
>
> (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
>
> (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
>
> (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of– (a) deciding one way or another, or (b) failing to make the decision."

(3) Finality (re-opening judgments)

16. During the hearing I invited submissions on the *Barrell* jurisdiction to recall or re-open judgments. Mr Bogle helpfully took me to the original decision of the Court of Appeal in *Re Barrell Enterprises* [1973] 1 WLR 19 itself. Mr Ahlquist relied on the recent decision of the Supreme Court in *AIC Ltd v Federal Airports Authority of Nigeria* [2022] 1 WLR 3223 where Lord Briggs and Lord Sales JJSC (with whom the remaining members of the Court agreed) gave judgment. They stressed that the Civil Procedure Rules provided a new code for litigation and that there is a strong public interest in the finality of litigation

under the overriding objective: see [28]. They emphasised the relevance of *Henderson v Henderson* abuse in this context and then at [31] they expressed themselves in full agreement with the following statement of Coulson LJ in the Court of Appeal:

> "The principle of finality is of fundamental public importance … The successful party should not have to worry that something will subsequently come along to deprive him or her of the fruits of victory. The unsuccessful party cannot treat the judgment that has been handed down as some kind of rehearsal, and hurry away to come up with some new evidence or a better legal argument … there is a particular jurisdiction which permits a judge to change his or her order between the handing down of the judgment and the subsequent sealing of the order. But in most civil cases, the latter is an administrative function, and it would be wrong in principle to allow parties carte blanche to take advantage of an administrative delay to go back over the judgment or order and reargue the case before it is sealed. Hence it is a jurisdiction which needs to be carefully patrolled."

17. They then stated that on receipt of an application by a party to reconsider a final judgment, a judge should not start from anything like neutrality or evenly balanced scales: see [32]. However, they declined to lay down a prescriptive test although they did express the view that the fact that something is unusual or even very rare says little or nothing about its weight: see [36]. They continued (specific references removed) at [37]:

> "37. It is not feasible to state such a test. An evaluative judgment has to be made, but it has to reflect and respect the importance in this context of the principle of finality. Structured forms of discretion, where a general discretionary power exists but the exercise of the discretion is governed by principles which accord priority and greater weight to some factors over others, arise quite often in the law:..A judge exercising such a discretion will err in law if he or she does not act in accordance with the principles which govern that exercise. In other contexts, by contrast, a discretion may be more open-ended, such as in relation to ordinary case management decisions, and leave greater choice to the judge to decide the weight to be given to each factor."

18. They then discussed *Manchester City Council v Pinnock* [2011] 2 AC 811. In that case the Supreme Court had used the particular form of words set out below in relation to a landlord's right to possession and Lord Briggs and Lord

Sayles considered it to be helpful in the present case for the following reasons (at [38] to [40]):

> "38…In order to express this idea, rather than saying that an order for possession should be refused only in "very highly exceptional cases" (see para 51) the court instead spoke of the authority's property rights being, "in the absence of cogent evidence to the contrary, … a strong factor in support [of the making of such an order] … in the overwhelming majority of cases" (para 53) and a matter "of real weight" constituting "a very strong case" for the authority in favour of obtaining such an order (para 54).
>
> 39. In light of the importance of the finality principle in the present context, we consider that such formulae are appropriate to be used here. It is difficult to improve upon them. The question is whether the factors favouring re-opening the order are, in combination, sufficient to overcome the deadweight of the finality principle on the other side of the scales, together with any other factors pointing towards leaving the original order in place.
>
> 40. It would also be wrong to attempt to identify a list of factors prima facie qualifying for inclusion as being in principle sufficient to displace the finality principle. Subsequent cases will always reveal that the list has proved to be inadequate, and the peculiarities of the present case could hardly have been imagined in advance. Some, such as judicial change of mind, have already been the subject of analysis in the authorities, but even they are of widely variable weight. It is perhaps easier to advance factors that will have no significant weight, such as a desire by counsel to re-argue a point lost at trial in a different way."

(4) Adjournments

19. Given that one limb of the Status Application involved an application for an adjournment, I drew the analogy in argument between the present case and applications for late adjournments based on medical evidence. I drew the parties' attention to the decision of Adam Johnson QC (as he then was) in *The Financial Conduct Authority v Avacade Ltd* [2020] EWHC 26 (Ch) in which the judge conveniently set out the relevant principles. In particular, he cited the decision of the Court of Appeal in *GMC v Hayat* [2018] EWCA (Civ) 2796 in support of the proposition that, in considering the weight to be attached to a particular medical report, the court is entitled, indeed obliged, to look at it in light of the history and the other materials available to it: see [60].

20. I put that proposition to both counsel and Mr Bogle accepted that the weight to be attached to expert medical evidence was a matter for the Court and that in attributing weight to it, I was entitled to take into account the history of the proceedings. Mr Bogle did not submit that I was bound to accept a medical opinion and, in my judgment, he was right not to do so. In *GMC v Hayat* Coulson LJ considered it wrong in principle to take the position that a medical report "somehow trumped all that had gone before it": see *Avacade* (above) at [63].

B. Sanction

21. In *FCA v McKendrick* [2019] 4 WLR 65 the Court of Appeal gave guidance to the Court in sentencing a contemnor for civil contempt which involves breaches of a court order. The decision was cited and considered by Arnold LJ on the appeal against the judgment dated 12 January 2022 which I gave on the first committal application against Ms Khan ([2022] EWHC 45 (Ch)) (the "**First Judgment**"). The Court of Appeal's judgment is reported at [2022] EWCA Civ 287 and Arnold LJ cited *McKendrick* at [12]. In that case Hamblen and Holroyde LJJ delivered a joint judgment in which they stated as follows at [39] to [41]:

> "The court should first consider (as a criminal court would do) the culpability of the contemnor and the harm caused, intended or likely to be caused by the breach of the order. In this regard, aggravating or mitigating factors which are likely to arise for consideration will often include some of those identified by Popplewell J in the *Asia Islamic Trade Finance Fund* case (see para 32 above). Having determined the seriousness of the case, the court must consider whether a fine would be a sufficient penalty. If it would, committal to prison cannot be justified, even if the contemnor's means are so limited that the amount of the fine must be modest.
>
> 40. Breach of a court order is always serious, because it undermines the administration of justice. We therefore agree with the observations of Jackson LJ in the *Solodchenko* case (see para 31 above) as to the inherent seriousness of a breach of a court order, and as to the likelihood that nothing other than a prison sentence will suffice to punish such a serious contempt of court. The length of that sentence will, of course, depend on all the circumstances of the case, but again we agree with the observations of Jackson LJ as to the length of sentence which may often be appropriate. Mr Underwood was correct to submit that the decision as to the length of sentence

> appropriate in a particular case must take into account that the maximum sentence is committal to prison for two years. However, because the maximum term is comparatively short, we do not think that the maximum can be reserved for the very worst sort of contempt which can be imagined. Rather, there will be a comparatively broad range of conduct which can fairly be regarded as falling within the most serious category and as therefore justifying a sentence at or near the maximum.
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> 41. As the judge recognised, it may sometimes be necessary for the sentence for this form of contempt of court to include an element intended to encourage belated compliance with the court's order. Where that is the case, that element of the sentence is in principle one which may be remitted if the contemnor subsequently purges his contempt by complying with the order.”

22. One criticism which Ms Khan’s counsel had made of the First Judgment to the Court of Appeal was that I had failed to give credit for the admissions which she had made. The Court of Appeal rejected this submission. But the court also considered whether it is appropriate for the court to state a starting point for the sentence and then apply various discounts to arrive at the appropriate order. Arnold LJ dealt with this point at [42] to [45] (which I quote):

> “During the course of argument, a point that was raised in that regard by counsel for Ms Khan is that the judge had not in the present case proceeded by stating a starting point for his sentence and then applying an articulated discount to that starting point. That is an approach which has sometimes been adopted in the case of civil contempt's, as can be seen, for example, from the *Hussain v Vaswani* case where the judge stated that he was taking as his starting point a sentence of 18 months and then applied various discounts to arrive at his final sentence of 12 months. In the present case, however, the judge did not adopt that approach.
>
> 43. Counsel for Ms Khan did not suggest that there was any error of principle in not adopting that approach. He suggested, however, that it would have been helpful if he had adopted that approach. Furthermore, he suggested that this was something that would be beneficial if judges were to do it in future.
>
> 44. I do not accept that there can be any uniform approach when it comes to civil committal applications. Unlike criminal sentencing, sentencing in cases of civil contempt of court is not subject to any statutory provisions save as to the limit on the sentence that can be applied and as to the degree of remission that is to be applied. There are no guidelines from the Sentencing Council. Moreover, the case law shows that the correct sentence to be imposed is highly fact-specific. Yet further, as I have already discussed, a key factor in this jurisdiction is that of attempting to secure compliance, even if

> belatedly, with the court's orders. That is not a feature of criminal sentencing in most cases.
>
> 45. While there will be cases in which it can be useful for the court to take a starting point and then apply a discount, I do not think that it can be said that that will always be helpful. It is particularly in a case of the present kind, where there has been no real admission and no evidence either of compliance or of any intent to comply in future, that an approach of that kind is least likely to be helpful. In short, not only do I see no error in the judge's approach, but also I am not convinced that it would have been a helpful exercise for him to have attempted to articulate a starting point and a discount for the factors that he did take into account."

23. In this judgment, I propose to adopt a very similar approach to the one which I adopted in the First Judgment In particular, I propose to run through the *Crystal Mews* criteria in order to arrive at basic sanction or sentence. I then consider whether I should make any discount for personal mitigating factors. Arnold LJ set out the applying the *Crystal Mews* criteria at [11] and [12]:

> "(a) whether the claimant has been prejudiced by virtue of the contempt and whether the prejudice is capable of remedy;
>
> (b) the extent to which the contemnor has acted under pressure;
>
> (c) whether the breach of the order was deliberate or unintentional;
>
> (d) the degree of culpability;
>
> (e) whether the contemnor has been placed in breach of the order by reason of the conduct of others;
>
> (f) whether the contemnor appreciates the seriousness of the deliberate breach;
>
> (g) whether the contemnor has co-operated.
>
> (h) whether there has been any acceptance of responsibility, any apology, any remorse or any reasonable excuse put forward."

24. Mr Ahlquist drew my attention to *Oliver v Shaikh* [2020] EWHC 2658 (QB) where Nicklin J considered that the question of sanction is entirely for the Court and that the role of the Applicant as similar to the role of the prosecution in a criminal case: see the full statement of the law at [14] to [21]. Mr Ahlquist pointed out, however, that in *Business Mortgage Finance 4 plc v Hussain* [2023] 1 WLR 396 the Court of Appeal considered that there was nothing wrong with the Applicant suggesting a sentence to the Court. Nugee LJ stated this at [131]:

> "Mr Hussain's second ground of appeal was that the Issuers should not have suggested to the judge that the maximum term of imprisonment of 24 months should be imposed, and that the judge had been wrongly influenced by this. Counsel for Mr Hussain relied in support of this ground upon the statement of Nicklin J in Oliver v Shaikh [2020] EWHC 2658 (QB) at [16] that "similar to the role of the prosecution in a criminal court where the court is considering sentence, the party seeking punishment of the contemnor does not urge the imposition of any particular penalty on the contemnor". Since then, however, this court has held that applicants for committal are not under a duty to act wholly impartially, but on the contrary have a legitimate private interest in the outcome of the application: see *Navigator Equities Ltd v Deripaska* [2022] 1 WLR 3656, paras 132–138 (Carr LJ). Furthermore, applicants may appeal on the ground that the sentence imposed was unduly lenient: see e g *AAA v CCC* [2022] EWCA Civ 479. It follows, in my judgment, that there was nothing improper in the Issuers suggesting to the judge that the maximum sentence be imposed."

III. The Status Application

C. The Liability Judgment

25. The first issue which I must consider is whether I should re-open the Liability Judgment and either permit Mr Bogle to re-argue it on the basis of Ms Khan's status or dismiss it entirely. In the present case, the finality principle is a strong factor which weighs against re-opening the Liability Judgment. On 14 February 2023 I delivered a final judgment on liability and although no order was drawn up in which the Court declared that Ms Khan was liable for contempt, this was because I accepted Mr Bogle's submission to deal with liability and sanction separately. Moreover, I would have gone on to consider sanction and made an order immediately but did not do so because I acceded to Ms Khan's application for an adjournment. The SRA was, therefore, entitled to assume that my findings were final and only capable of challenge on appeal (whatever sentence the Court might have imposed).

26. In the present case, there are added reasons why the finality principle has greater weight. First, orders of the court should be seen to be obeyed and the overriding objective requires the Court to hear and determine committal applications promptly. Secondly, the present application involves the enforcement by the SRA of its public functions: see the Liability Judgment at [21] to [26]. There is a

strong public interest in requiring solicitors and former solicitors to comply with their statutory duties under Schedule 1 promptly.

27. The Court has shown a considerable degree of indulgence to Ms Khan both in relation to the late service of evidence and the adjournment of hearings. On 4 October 2022 the Committal Application was issued. It was originally listed for hearing on 6 December 2022 but rather than hear it immediately (as Mr Ahlquist pressed me to do) I gave directions for the service of evidence and re-listed it for hearing on 1 and 2 February 2023. I set out the chronology in the Liability Judgment and I do not repeat it here. But on both occasions Ms Khan served evidence just before the hearing which put the SRA in a difficult position: see [14].

28. On 6 January 2023 Ms Khan served a first expert report and on 6 March 2023 she served a second report. I express no view in this judgment about whether the time taken to obtain both reports was reasonable and it may be that this will have to be explored on appeal. Nevertheless, I am satisfied that Ms Khan had every opportunity to put her case before the Court and to take every point which she wished to take in her defence. In my judgment, the time taken to hear the Committal Application and the allowances made by the SRA and the Court adds further weight to the "deadweight of the finality principle" in the present case.

29. Mr Bogle relied on the expert evidence filed by Ms Khan on 6 March 2023 to displace the finality principle on the basis that it gave rise to exceptional circumstances. For the reasons which I have set out in the Confidential Schedule, I attribute little weight to certain parts of that evidence and I am not satisfied that Ms Khan (or, more properly, those currently representing her) have a real prospect of persuading the Court that she is a protected party within the meaning of CPR Part 21.1(1). Given that the strength of this evidence is insufficient to outweigh or displace the finality principle, I dismiss Mr Bogle's application to re-open and set aside the Liability Judgment.

30. In case the matter goes further, I express the view that I would have been prepared to re-open the Liability Judgment and give directions for the re-hearing of the Committal Application if I had attributed significant weight to the relevant

evidence and I had been satisfied that Ms Khan (or, more properly, those currently representing her) had a real prospect of persuading the Court that she was a protected party within the meaning of CPR Part 21.1(1). I would have been prepared to find that the finality principle was outweighed or displaced by two factors.

31. First, there would have been a real risk of injustice if I had imposed a sentence of imprisonment upon Ms Khan in those circumstances and committed Ms Khan to prison. The right of the individual to liberty must be a very strong counterweight to the finality principle. But, secondly, and perhaps more importantly in the present case, I do not see how the SRA could have taken a further step in the Committal Application or the Court could have proceeded to sanction her until the question whether she was a protected party had been determined: see CPR Part 21.6 (above). In those circumstances, the overriding objective would have been best served by re-hearing the Committal Application altogether. If the Court had finally determined that she was a protected party (and, in particular, during the hearing on 1 and 2 February 2023), this would have cast significant doubt on the Liability Judgment and my finding at [119]. As it is, this issue does not arise in my judgment because of the very limited weight which I have attributed to the relevant evidence.

D. Adjournment

34. For the reasons which I have set out in the Confidential Schedule, I refuse the adjournment application. As I explored in argument, I am entitled to assess the weight to be attached to the expert evidence served on 6 March 2023 and I attach little weight to certain parts of it against the weight of the evidence and the history which I have set out in the Confidential Schedule. Again, if the matter goes further, I express the view that I would have been prepared to grant an adjournment if I had taken a different view of the relevant evidence and attached significant weight to it.

IV. Sanction

E. The Parties Submissions

32. Mr Ahlquist reminded me in C's Skeleton of the guidance in *McKendrick* (above) and that a sentence of imprisonment is a measure of last resort but that it may be justified where there has been a serious and deliberate flouting of the Court's order. He also submitted that Ms Khan's conduct was at the most serious end of the scale for the following reasons:

    (1) Ms Khan was still a solicitor and an officer of the Court at the time of the Miles Order.

    (2) She had disregarded the Miles Order in full knowledge of the consequences and as part of a consistent patten of defying both regulatory requirements and orders of the Court. In support of this submission he relied on the CityAM article which I considered in the Liability Judgment at [100](4) to (6).

    (3) The effect of the breaches of the Order have been to facilitate Ms Khan continuing to represent clients through JFP. He relied on the ruling of Mr Paul Bennett, the acting Coroner for Pembrokeshire and Carmarthenshire, dated 6 June 2022 and I have re-read paragraphs 9 and 18 of his ruling. I note that the coroner stated that what was playing out before him was a process where Ms Khan was acting as an advocate, that it was completely unworkable and also a breach of the Third Order (as I defined it in the First Judgment).

    (4) Ms Khan's non-compliance was deliberate and she has consistently gone out her way to obstruct the SRA by failing to cooperate with the intervention and by deliberately giving false evidence on the Committal Application.

33. Mr Ahlquist also reminded me that the Court of Appeal had considered the discount which I made in the First Judgment for absence of harm to be a generous one and that it was inherently likely that if a solicitor fails to deliver up the firm's files, clients will be prejudiced. In particular, Arnold LJ stated as follows at [34]:

> "…..the judge stated that he accepted the submission that some discount should be made for the absence of harm or prejudice. The extent of the discount to be applied was a matter for the evaluation of the judge. This Court is in no position to interfere with the judge's assessment. Indeed, it might again be said that the judge's assessment was a generous one: as my Lord, Nugee LJ pointed out during the court of argument, part of the point behind the powers conferred on the SRA by paragraph 9 of Schedule 1 of the 1974 Act is to enable the SRA's intervention agent, once the firm's files have been secured, to contact the clients of the firm to ensure that, apart from anything else, they are not without legal representation and advice. In circumstances where there has been an intervention, the former solicitor will no longer be able to act for the clients. Accordingly, they will need to instruct fresh solicitors. They may choose to instruct the intervention agent, they may choose to instruct a different firm, but they will not be able to continue to instruct the solicitor in question and they need to know that as soon as possible. Therefore, it is inherently likely that, if the solicitor refuses to deliver up the firm's files, clients will be prejudiced."

34. Mr Ahlquist also drew my attention to two examples of harm which clients had suffered. First, he referred to the extensive evidence of steps taken by Mr Humpston recover his files including a complaint to the Legal Ombudsman. Secondly, he pointed out that Ms Coulthard had also made a complaint to the Legal Ombudsman. He submitted that I could take this into account even though I had not been satisfied to the criminal standard that Ms Khan still retained the Coulthard file.

35. Finally, Mr Ahlquist reminded me of the guidance in *FCA v McKendrick* (above) about the maximum sentence which the Court may impose. He submitted that even if I gave Ms Khan a discount for her personal circumstances, I could still impose a sentence of close to the maximum in the present case given the factors present. He also reminded that the punitive element of a sentence for contempt is not limited to punishment for past breaches of the Court's orders but may also reflect an element of deterrence, particularly, where a public interest is (as here) engaged: see, in particular, *Cuciurean v The Secretary of State for Transport* [2021] EWCA Civ 357 at [81] (Warby LJ).

36. Mr Bogle drew my attention to the recent guidance in *Zubaidy v Borg* [2023] EWCA Civ 148 where the Court of Appeal had held that a judge had not erred in committing a father to prison again for continued breach of orders requiring him

to procure the return of his children from Libya. He pointed out that in deciding whether to commit a contemnor to prison for continuing breaches of the same order, the Court of Appeal had to decide whether it was necessary and proportionate to return a contemnor to prison after taking into account the time already spent there. He also submitted that there might come a time where the must say "enough is enough" when dealing with multiple breaches arising out of similar facts.

37. Mr Bogle also repeated the submission (which I accepted in the First Judgment) that there was no evidence of specific harm and that the Court should discount the SRA's reliance upon the Coulthard file because I had not found that Ms Khan had committed a breach of the Order by failing to deliver it up to Mr Owen, the intervention agent. Finally, Mr Bogle drew my attention both in writing to a number of mitigating factors, namely, Ms Khan's mental and emotional impairment, the financial consequences for her of being struck off and being unable to practise as a solicitor. Finally, he submitted that I had found only limited breaches of paragraph 1 of the Miles Order and that I had not found that 14 of 17 allegations of breach had been made out.

F. Findings

38. In my First Judgment I considered Ms Khan's contempt of court to be serious and I described it in the following terms at [55]:

> "Both Orders were clear on their face and I have found that Ms Khan knew that she was acting in breach of both of them and understood the consequences of the failure to comply with them. Moreover, it was necessary for the SRA to obtain those Orders to compel Ms Khan to comply with her obligations to her regulator. Her failure to comply with the orders involved not only an attack on the administration of justice – as Miles J described it in Adams at [65] – but also defiance of her regulator. The powers of the SRA to intervene in a solicitors practice are intended to protect both members of the public and public confidence in the profession and there is a strong public interest in ensuring that solicitors co-operate promptly with the SRA. Finally, Ms Khan is a solicitor and should be held to a higher standard than an unqualified defendant."

39. Regrettably, nothing has changed since I gave judgment except that Ms Khan's intervention challenge has failed and she has been struck off as a solicitor. I also

reject Mr Bogle's submission that I made only limited findings of contempt against Ms Khan. If anything, I regard Ms Khan's breach of paragraph 5 of the Miles Order as equally serious if not more serious than her breach of paragraph 1. She was ordered to deliver up the files and, if she could not do so, to explain why. The explanation which she gave was inadequate and, in some cases, deliberately false and, as a consequence, I could not decide whether she had committed further breaches of paragraph 1. I am satisfied, therefore, that the breaches of the Miles Order are equally serious if not more so than the breaches which I considered in the First Judgment.

40. I bear in mind that Ms Khan has served the sentence which I imposed for the breaches of the earlier Orders and I must not punish her again for past breaches of those orders. But, in my judgment this is not a case where it could be said that "enough is enough" or where it would be unnecessary or disproportionate to sentence a contemnor again. But in any event, it is not a case where the Court is considering a second sentence for continuing or further breaches of the same order. Miles J was prepared to make a further Order and Ms Khan failed to comply it notwithstanding her earlier committal. Moreover, the continued harmful effect on Ms Khan's clients and the necessity of ensuring that the SRA is not frustrated in carrying out its statutory functions are powerful factors militating against the argument that no further sanction should be imposed: compare *Zubaidy v Borg* (above) at [30] (Bean LJ).

(a) Prejudice

41. Contrary to the view which I took in the First Judgment, I accept that it is inherently likely that if a solicitor fails to deliver up the firm's files, clients will be prejudiced and this time I make no discount for the absence of prejudice or harm. On 19 August 2021 the Panel made its decision and the effect of Ms Khan's conduct has been to continue to frustrate the intervention for a further 10 months. Indeed, it is clear that Ms Khan's continued attempts to represent the Beynon family was not in their long-term interests, however loyal they may have been to Ms Khan.

42. I also accept that the Court had before it two examples of the kind of specific harm suffered by Ms Khan's clients. I reject Mr Bogle's submission that I cannot take account of the evidence relating to the Coulthard file. As Mr Ahlquist pointed out, the only reason there can be any doubt about the location of Ms Coulthard's file is that Ms Khan had failed to comply with paragraph 5 of the Miles Order. Moreover, it is clear on the evidence that Ms Khan has not returned the file either to Mr Owen or Ms Coulthard herself and the only doubt is whether it remains in Ms Khan's possession or control (or whether, for example, she has destroyed it).

(b) Pressure

43. There is no evidence that Ms Khan acted under pressure from third parties to commit the breaches of the Miles Order. Indeed, her position throughout the Committal Application was that she had complied with it.

(c) Whether the breaches of the order were deliberate or unintentional

44. I have also found that Ms Khan made a deliberate attempt to mislead the Court in relation to paragraph 1 of the Miles Order and that her failure to comply with paragraph 5 of the Order until 30 November 2022 was both serious and deliberate and only prompted by the Committal Application: see [100](2) and [112].

(d) Culpability

45. I consider the degree of Ms Khan's culpability to be high because the breaches of the Order were deliberate and serious and because Ms Khan's motive was to take a stand and defy the SRA, her regulator: see the Liability Judgment, [100](6). I also remind myself that the SRA has the power to intervene in the public interest and to nip dishonesty in the bud. Ms Khan's culpability in defying the SRA is greater for this reason.

(e) Third Parties

46. There is no evidence that Ms Khan has been placed in breach of the Order by the conduct of third parties. In particular, I have found that she was personally

responsible for the contempt of court of both the Firm and JFP: see [121] and [122].

(f) Seriousness of the Breach

47. I found that Ms Khan failed to produce or deliver up to Mr Owen accounting records, namely, the Ledger and the Bank Statements and that she failed to produce or deliver up the Beynon and Humpston files and remains in breach of paragraph 1 of the Order: see the Liability Judgment, [124] and [125]. I consider these breaches of paragraph 1 of the Miles Order to be serious. I have also found that Ms Khan had committed a serious breach of paragraph 5 of the Order, that her breaches were both material and serious and that she remains in breach of paragraph 5 of the Order in a number of significant respects: see [113]. I am satisfied that Ms Khan was aware of the seriousness of the breach and, in particular, in failing to comply with paragraph 5 of the Miles Order.

(g) Co-operation

48. Ms Khan has failed to cooperate with the SRA throughout the intervention and since 27 April 2021. Further, Ms Khan used the medical evidence which I have considered in the Confidential Schedule as a reason for choosing not to file evidence showing what steps she had taken to purge her contempt. She was capable of making Khan WS1 on 3 March 2023 and, even if her legal team had real concerns about her ability to give them instructions, I see no reason why she could not have completed her affidavit and set out what steps (if any) she had taken to purge her contempt. It follows that I can give no discount to Ms Khan for co-operation.

(h) Acceptance of responsibility, apology, remorse or reasonable excuse

49. Ms Khan made very limited admissions in Khan 1 to Khan 4 accepting that she had failed to deliver up the Ledger and Bank Statements and certain documents relating to Mr Humpston. She also accepted that she had failed to make a witness statement in accordance with paragraph 5 until 30 November 2022. However, she did not accept she had committed any of the other breaches of the Miles Order which I have found and contended that her failure to serve a witness

statement until 30 November 2022 was not a breach of the Order. In my judgment, the admissions which Ms Khan made formed part of a calculated attempt to deceive the Court into accepting that she had otherwise complied with the Miles Order.

50. Having considered all of these factors, I am satisfied that Ms Khan's breaches of the Miles Order justifies a custodial sentence of a significant length. Given my findings (above) the minimum sentence which I can impose is 18 months. I consider the breaches to be at the higher end of the scale but not sufficiently serious to justify the statutory maximum. I impose eighteen months for the breaches of paragraph 1 and eighteen months for the breaches of paragraph 5 to run concurrently. I also impose a sentence of twelve months for the past breaches of the Miles Order and six months to secure future compliance. My principal reasons for imposing a significantly higher sentence than I did in my First Judgment are as follows:

    (1) In my judgment, the failure to comply with paragraph 5 for almost seven months and the deliberate attempt to mislead the Court into accepting that she had complied with the Order whilst continuing in breach justify a higher sentence for the past breaches of the Miles Order which Ms Khan has committed.

    (2) In my First Judgment, I sentenced Ms Khan for three months to secure compliance with the Orders with which she had failed to comply. I also made it clear that if she purged her contempt within the first six weeks of her sentence, I would discharge the remainder of her sentence. It is clear that a sentence of three months was inadequate to secure her compliance with either Order.

    (3) I would have doubled the sentence for past breaches to six months to reflect the factors in (1) and (2) (above). But I also increase it to take account of two additional factors: first, the harm which Ms Khan's breaches of the Order have continued to cause to her former clients and, secondly, to take account of deterrence. Ms Khan has both attracted and courted publicity: see, for example, the City AM article. It is important that

her sentence should discourage other solicitors or former solicitors from failing to comply with Schedule 1.

G. Mitigation

51. Apart from the conclusions which relate to her status, I accept the medical evidence about Ms Khan's condition which I have indicated in the Confidential Schedule. I also accept that the time which she spent in prison was very traumatic for her and is likely to be more difficult or burdensome for her as a consequence of her condition. Finally, I accept that the financial consequences of the intervention have been disastrous for Ms Khan. Because of these personal circumstances, I apply a discount of 33% to the sentence which I would otherwise have imposed and sentence her to 12 months. However, it would not be appropriate in my judgment to suspend Ms Khan's sentence either because of her medical condition or to enable compliance with the Miles Order.

V. Disposal

52. I will therefore make an order that the Respondents are liable for contempt of court and that Ms Khan, the First Respondent, is sentenced to prison for 12 months. I am, however, prepared to entertain an immediate application for a stay of execution pending an appeal and, if necessary, to extend time for an appeal given the unusual features of this case and the issues which arose at or before the sanction hearing. I remind Ms Khan that she is entitled to appeal against the findings of contempt as of right once a committal order is made and I propose to make such an order following the hand down of this judgment on sanction.